86-2067

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

BOB SCHWARTZ, *Petitioner,*

v.

CITY OF GRAND PRAIRIE, TEXAS AND
STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED

1. Whether City and/or State governments are immune from damages for a "freeze" ordinance banning any development, zoning, platting, or issuance of building permits as to selected parcels of land in a proposed future highway corridor.

2. Whether such "temporary" ordinance is a taking within the preview of the Fifth and Fourteenth Amendments.

3. Whether Petitioner is entitled to a trial for damages for diminution of value of his subject property and his loss of use of same as a result of such a "freeze" ordinance.

4. Whether Petitioner should have to pay property taxes on property affected by a "freeze" ordinance.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BOB SCHWARTZ, *Petitioner,*

v.

CITY OF GRAND PRAIRIE, TEXAS AND
STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

TIMOTHY W. SORENSON and JERRY D. BROWNLOW, on behalf of BOB SCHWARTZ, petition for a Writ of Certiorari to review the Judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The Supreme Court of Texas refused certiorari and overruled Petitioner's Motion for Rehearing (Appendix B). The opinion of the Court of Appeals, Fifth District of Texas at Dallas affirmed the Judgment of the trial Court which held against Petitioner (Appendix C) in an unpublished opinion.

JURISDICTION

The final Judgment of the Supreme Court of Texas overruling Petitioner's Motion for Rehearing of Petitioner's Application for Writ of Error was entered February 11, 1987. The jurisdiction of this Court is involved under 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation."

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws . . . "

3. The State of Texas Statutes, Article 1011a., Grant of power for zoning, Vernon's Texas Statutes provides in relevant part:

> "For the purpose of promoting health, safety, morals, and for the protection and preservation of places and areas of historical, cultural, or architectural importance and significance, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings, and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purpose; and, in the case of designated places and areas of historic, cultural, or architectural importance and significance, to regulate and restrict the construction, alteration, reconstruction, or razing of buildings and other structures.

4. The State of Texas Statutes, Article 1011b., Districts, Vernon's Texas Statutes provides in relevant part:

> "For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this Act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts."

5. The State of Texas Statutes, Article 1011g., Board of adjustment, Vernon's Texas Statutes provides in relevant part:

> "(a) . . . that the said Board of Adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.
>
> "(g) The Board of Adjustment shall have the following powers:
>
> "(2) To hear and decide special exceptions to the terms of the ordinance upon which such Board is required to pass under such ordinance.
>
> "(3) To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

6. The City of Grand Prairie Ordinance No. 3363 provides in relevant part:

"AN ORDINANCE RECOGNIZING THE RIGHT OF WAY OF TEXAS STATE HIGHWAY 161; PROHIBITING DEVELOPMENT WITHIN THE CORRIDOR OF SAID HIGHWAY; TO BECOME EFFECTIVE UPON ITS PASSAGE AND APPROVAL

" . . . WHEREAS, the City has received an official map of the right of way of Texas State Highway 161 dated June 1979, revised April 1980 and June 1981 and entitled 'S.H. 161 From I.H. 20 to S.H. 114 SCHEMATIC', which map is on file in the office of the Director of Public Works of the City; and

"WHEREAS, the State of Texas has indicated to the City that it will begin acquiring the right of way shown on said map; and

"WHEREAS, the right of way should be protected from encroachments and obstructions; and

"WHEREAS, the construction of Texas State Highway 161 will be beneficial to the growth, development, commerce, and travel of the citizens of Grand Prairie, Texas."

"NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS:

"*SECTION 1:* THAT there ~~shall be~~ allowed no development, zoning, platting nor the issuance of building permits within the area designated on the Schematic Map referred to above as the right of way of Texas State Highway 161.

". . . PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS, this 3rd day of August, 1982 . . . " (For full text, see Appendix D.)

7. The City of Grand Prairie Ordinance No. 3424 provides in relevant part (amending Section 1 of Ordinance No. 3363 above):

> "*Section 1:* . . . [T]hat building permits may be granted for interior remodeling of existing structures not to exceed 50% of the value of the building . . .
>
> " . . . PASSED AND APPROVED . . . this 11th day of January, 1983." (For full text, see Appendix E.)

8. The City of Grand Prairie Ordinance No. 3629 provides in relevant part:

> "Ordinances No. 3363 and 3424 shall be of no force and effect and the prohibitions thereof shall cease December 31, 1984.
>
> " . . . PASSED AND APPROVED . . . this 26th day of June, 1984." (For full text, see Appendix F.)

STATEMENT

When the original suit was filed, Petitioner, a developer, owned two vacant parcels of land in Grand Prairie, Texas. The smaller one was acquired in 1972 (the "Dalworth property") and the larger one (an 8-acre tract on the north side of town, the "19th Street property") was acquired in 1978. Both parcels of land lay predominantly in the proposed State Highway 161 (SH 161) corridor.

On August 3, 1982, Respondent, CITY OF GRAND PRAIRIE, TEXAS, sometimes hereinafter referred to as "CITY", passed Ordinance No. 3363 prohibiting development[1] of real property within the State Highway 161

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[1]Prohibited development, zoning, or platting for seventeen months. After the fifth month, CITY OF GRAND PRAIRIE, TEXAS, did by Ordinance No. 3629 allow interior remodeling of existing buildings up to 50% valuation of said building. Ordinance No. 3629 did not apply to Petitioner, since his property was vacant.

(SH 161) corridor. Said ordinance was in effect until December 31, 1984,[2] for two years, five months. Although the additional Respondent, STATE OF TEXAS, designated SH 161 on April 19, 1971, as of the day of the writing of this petition, construction has not begun on SH 161.

Petitioner applied for and was denied a building permit on his Dalworth property during the time of the moratorium established by the CITY.[3]

At this point, Petitioner felt it futile to appeal same or apply for building permit(s) on his 19th Street property since the CITY's ordinance was totally prohibitory as to vacant property. Petitioner, on March 14, 1984, sought redress in the appropriate Texas State Court seeking declaratory relief, injunction, and damages. In the original petition in the State Court, the Petitioner alleged that the ordinances were violative of the U.S. Constitution. It was only after the filing of Petitioner's suit that the CITY passed Ordinance No. 3629 which terminated the building and development ban as of December 31, 1984.

On June 10, 1984, (during the moratorium), Petitioner and CITY both filed Motions for Summary Judgment.

Thereafter, the trial Court granted Respondent CITY's Motion for Summary Judgment[4] stating that it is the [trial] Court's ". . . opinion that by granting Summary Judgment in favor of the CITY OF GRAND PRAIRIE, TEXAS, [Petitioner's] claims against the STATE are moot." A succession of appeals followed until on February 11, 1987,

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[2]CITY OF GRAND PRAIRIE, TEXAS, lifted the prohibitory ordinances effective December 31, 1984.

[3]Petitioner applied for a building permit on his Dalworth property in December, 1983, and it was denied January 30, 1984.

[4]Signed by the trial Court on September 12, 1985.

the Supreme Court of Texas finally overruled Petitioner's Motion for Rehearing.

Petitioner alleges that, by operation of the ordinances banning his use of his property, for whatever period of time, he has been deprived of property without due process of law by State Action, his property has been taken for public use without compensation, and he has been deprived of equal protection under the law.[5]

Petitioner urges the damage issue remains for the taking during the moratorium of two years, five months[6] on Petitioner's property either as to lost rental, diminution of value of the property by reason of the wrongful ordinance, and/or for the taxes Petitioner paid during the moratorium.[7]

REASONS FOR GRANTING THE PETITION

This case presents the important question whether it is permissible for local and/or state governments, solely for the purpose of preventing encroachment on right of way for future thoroughfares, to ban and prohibit, even temporarily, use of an individual's real property without compensation. (A mere reading of the main CITY ordinance here attacked establishes that its sole purpose was to ban use of property within the proposed right of way for a state highway.)

The operation of the ordinances in question has a two-fold effect on Petitioner. The ordinances:

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[5]United States Constitution Fifth and Fourteenth Amendments. The property owners along SH 161 corridor were discriminated against, since they were the only ones affected by the zoning.

[6]At five months into the seventeen-month prohibitory moratorium, Petitioner could improve any existing building up to 50% valuation, but since Petitioner had no buildings, this "savings clause" did not apply to him.

[7]Petitioner would assert that this moratorium prohibition effectively precluded Petitioner's alienation of his property during the seventeen-month "freeze" since he could not sell it during that period. (The government had rented it, if you will.)

(1) Affect a taking of Petitioner's property without compensation and without due process of law; and

(2) Deprive Petitioner of equal protection of law by imposing on him a special burden not shared by others in the CITY who benefit from the proposed thoroughfare.

The Court of Appeals, Fifth District of Texas at Dallas, in an unpublished opinion, sustained the trial court and was affirmed by the Supreme Court of Texas.[8] The Appellate Court sidestepped the damage issue stating Petitioner lacked standing to sue. The Court of Appeals stated:

> "Schwartz never requested a building permit or a variance from the Grand Prairie Board of Adjustment for his '19th street property.' Schwartz did apply for a building permit for his 'Dalworth property,' but the permit was denied by a city plan review analyst. Schwartz did not, however, appeal his denial to the Board of Adjustment, nor did he request a variance for his property.
>
> "Schwartz did not obtain a final decision from the City of Grand Prairie regarding the application of these ordinances to his properties. Therefore, we hold that his suit is not ripe, and that he lacks standing to bring suit."

Citing *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S.Ct. 3108, L.Ed.2d 126 (1985). The Supreme Court of Texas affirmed that decision by overruling Petitioner's Motion for Rehearing.

In *Williamson,* the owner began development of a 676-acre residential subdivision in 1973. By 1979, the developer had

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[8]The Supreme Court of Texas overruled Petitioner's Application for Writ of Error and Motion for Rehearing (of Application for Writ of Error) without comment.

spent millions on a golf course and completed 212 living units, all as approved by the Commission. Approximately 500 more dwelling units were contemplated under the original approved plat of 1973. In 1977, the Commission reduced the allowable density cutting out almost 200 dwelling units by a zoning change and in 1979 applied that zoning change to developer, thereby reducing by almost 200 units the total number of dwelling units developer would be allowed. Developer's successor in interest sued and the United States Supreme Court granted certiorari.

The United States Supreme Court held developer's question premature, stating "[Developer] has not yet obtained a final decision regarding the application of the zoning ordinance. . ."

In *Williamson,* supra, on Page 3117, the Court cites *Hodel v. Virginia Surface Mining & Recreation Assn., Inc.,* 452 U.S. 264,101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), to the effect that developer should seek either a variance from or a waiver to the restrictions. The *Hodel* Court said if the developers pursued administrative relief, a mutually acceptable solution might be reached.

In this case, there was no possible mutually acceptable solution. Government had "frozen" Petitioner's land by "prohibiting development" and stating "there shall be allowed no development".

Petitioner asserts there can be no variance or waiver of an "absolute prohibition".

Unlike *Williamson,* Petitioner had no improvements or buildings of any kind on the properties when the ordinances were passed. *Williamson* was a question of degree; in Petitioner's case, there was no room for compromise. The ban was absolute.

Williamson, supra, was allowing developer some building, just not as much or as dense as developer there wanted. Here the property was totally frozen as to any economic use or development of reasonable investment-backed expectations. There was a refusal to permit any development, denying developer an economically viable use of the land.

In *Hodel,* supra, the government was allowing some development of the general nature that developers requested. In *Agins v. Tiburon,* 447 U.S. 255, 100 S.Ct. 2138, 656 L.Ed 100 (1980), the government allowed some development. In *Williamson,* the commission allowed some development.

Here the CITY OF GRAND PRAIRIE, TEXAS, was prohibiting *all* development.

Again in *Agins,* this Court states at Page 2567:

> "Our cases uniformly reflect an insistence on knowing the *nature and extent of permitted development* before adjudicating the constitutionality of the regulations that purport to limit it." (Emphasis ours.)

In this case, "*no* development, zoning, platting, nor issuance of building permits"[9] was permitted under the very terms of the ordinances attacked.

In *MacDonald, Sommer & Frates v. Yolo County,* _____ _____ _____, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986), this Court cited the California Court of Appeals with approval stating on Page 2565:

> "Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to [the] *full* extent he might desire or be charged with an unconstitutional taking of the property. Here as in *Agins,* the refusal of

[9]Ordinance No. 3363; emphasis ours.

> the Defendants to permit the *intensive* development desired by the landowner does not preclude less intensive, but still valuable development." (Emphasis ours.)

The important question presented in *MacDonald,* supra, though never reached, was "whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings . . ." (Pages 2565-2566)

We pray this question be reached here. The focal question is not how the government will apply the regulation in question to the particular land in question, but the reach of the ordinance as expressed in its own terms. There can be no dissention that the ordinance is an absolute fiat against any development on its face.

MacDonald states on Page 2566 that a regulatory taking has two components, first Petitioner must establish that the regulation has "taken his property", and second the "proffered compensation is not 'just' "; that an essential prerequisite to the assertion of a regulatory taking claim is:

> " . . . a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes".

Here the regulation goes all the way. It takes everything for a period determined solely by the government with no compensation. If left standing, the CITY could re-enact this ordinance in the face of any attempted development and could, in fact, protect right of way for other thoroughfares in this unconstitutional manner.

The *MacDonald* Court points out, citing Justice Holmes in his opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. at

460, 43 S.Ct. at 160, "this is a question of degree — and therefore cannot be disposed of by general propositions." "To this day we have no 'set formula to determine where regulation ends . . .' "

It is advanced by Petitioner that a permissible "regulation" ended the day the government's ordinance became effective, and that then a taking commenced mandatory monetary remedies to Petitioner. Using the ad hoc inquiries of the *MacDonald* Court, the economic impact of the regulation was total, and its interference with reasonable investment-backed expectations was devastating.

During the effective date of the regulation, no beneficial use for the property existed. The regulation had the same effect as an appropriation of the property through eminent domain or physical possession. (They didn't even offer to mow the grass.)

The effect of the government's application of the regulation to the value of Petitioner's property was total diminution of value. The final decision as to how the regulation would be applied to Petitioner's property was decided by the CITY OF GRAND PRAIRIE, TEXAS, City Council on August 3, 1982, when it decided to prohibit "all development" within the SH 161 corridor for an indeterminate period of time.

The normal flexibility found in the *Hodel* and *Williamson* cases was starkly absent here. No adjustments were even contemplated. The regulation has "gone too far", and proffered no compensation, allowing no reasonable use of Petitioner's land.

As *MacDonald* says on Page 2567: "Our cases uniformly reflect an insistence on knowing the nature and extent of

permitted development before adjudicating the constitutionality of the regulations that purport to limit it."

The City fathers of the CITY OF GRAND PRAIRIE, TEXAS, made it abundantly clear that as to the nature and extent of development, none was to be allowed.

The *MacDonald* Court says on Page 2568 that:

> "the records in those cases[10] left us uncertain whether the property at issue had in fact been taken. Likewise, in this case, the holdings of both courts below leave open the possibility that some development will be permitted . . ."

Here the CITY OF GRAND PRAIRIE, TEXAS, left no doubt that no development was to take place.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

The Texas Courts erroneously hold that the Petitioner has no standing to sue by reason of the fact that he had failed to exhaust his administrative remedies by not applying for a building permit in the face of the ordinance as to one property, and by not applying for some sort of variance or exception from the terms of the ordinance as to both properties. This position begs the question of the unconstitutionality of the ordinances in the first instance. It should not be incumbent on a land owner to go through the empty ceremony of applying for a variance or exception to an *absolute* ban when the absolute ban by its very mandate would not allow same. Based on the authorities hereinbefore cited, it is conclusive that the CITY exceeded any authority it might claim under the police power to regulate the use of Petitioner's property, particularly in view of the obvious

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[10]*Agins*, supra, *Williamson*, supra, and *San Diego Gas & Electric v. San Diego*, 450 U.S. 621, 101 S. Ct. 1287, 67 L.Ed.2d 551 (1981)

intent of the ordinance. The ordinances in question are simply a blatant attempt by the CITY to "rig the market" (a phrase used by the Texas Supreme Court in another case) in favor of the public in detriment to the rights of the individual land owner.

Article 1011a., Vernon's Texas Civil Statutes, contains the grant of power of zoning for the CITY OF GRAND PRAIRIE. It provides that "Fór the purpose of promoting health, safety, morals,", the CITY is empowered to "regulate and restrict the height, number of stories, and size of buildings, and other structures, the percentage of a lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purpose;". Despite the wording of the ordinance here in question, its purpose was not to promote health, safety, and morals of the citizens, but was obviously for the purpose of protecting the right of way from encroachment. Neither was the ordinance designed to "regulate and restrict" land usage, but emphatically ban any use.

Article 1011b., Vernon's Texas Civil Statutes, permits the local legislative body to divide the city into districts for the purposes of carrying out the Act. There is no mention in the offensive ordinance of any sort of zoning district created by it, nor was it an amendment to the comprehensive zoning ordinance. To the contrary, it was a special ordinance announcing the legislative intent of the CITY to protect the right of way from encroachment while waiting for the STATE, at its leisure, to commence acquisition or condemnation proceedings. These ordinances simply were not zoning or regulatory ordinances in the context considered by the Court in all of the cases herein cited.

Article 1011g., Vernon's Texas Civil Statutes, establishes a Board of Adjustments and provides that it "may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained." It further authorizes the Board of Adjustments to authorize a variance from the terms of the ordinance, "so that the spirit of the ordinance shall be observed and substantial justice done." There is absolutely no authority granted by statute or under case law in Texas authorizing the Board of Adjustments to permit zoning, development, or building permits in the face of an ordinance duly enacted by the legislative body absolutely prohibiting or banning same.

Under no theory of law can the Board of Adjustments be empowered to make judicial findings as to the constitutionality of an ordinance enacted by the legislative body of the CITY. To imply that any Board of Adjustments would have such authority is to oust the Courts of jurisdiction in matters such as this, contrary to public policy.

To require the Petitioner to undergo the cumbersome process of appeal to the Board of Adjustments, and subsequent appeal to the District Court in response to an unconstitutional ordinance would be unreasonable. It would further delay justice which frequently results in no justice at all. (In one Texas case, cited by Petitioner in the State Court, a developer was "stalled" for approximately twenty-four (24) months trying to get a final permit for his development. This conduct was declared unconstitutional by the Texas Supreme Court in *City of Austin v. Teague,* 570 S.W.2d 389 (Tex 1978).

Based on the authorities hereinbefore cited, it is the Petitioner's contention that the ordinances in question were, at their inception, void and a nullity. Therefore, the Board of Adjustments had nothing to which it could grant a variance or exception and, not being a judicial body or clothed with any judicial authority, had no power to declare the ordinance void by granting any zoning, development, or building permit.

In summary, the government has transparently used its zoning powers to take Petitioner's property in this case for two years, five months. For said period of time, the property was virtually useless. Any damages directly occasioned by the ordinances and for the chilling effect of same should be determined by a Court and jury. The government's final definitive position in applying the regulation to Petitioner's empty land was *no* development. The government continued to assess taxes which Petitioner did pay. On the facts, Petitioner states there has been a taking without compensation.

CONCLUSION

(1) The Petitioner was deprived of the use of his property without due process of law and without compensation by reason of the operation of the ordinances of the CITY OF GRAND PRAIRIE, TEXAS, herein referred to.

(2) Petitioner was denied equal protection of law by reason of the operation of the ordinances of the CITY OF GRAND PRAIRIE, TEXAS, herein referred to in that Petitioner was deprived of the benefits of his property for the use and benefit of all of the citizens of the CITY OF GRAND PRAIRIE, TEXAS, as a whole.

For the foregoing reasons, this Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys For Petitioner,
BOB SCHWARTZ

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for a Writ of Certiorari were this date mailed to all other counsel of record in this case as shown below in the manner set beside each respective name:

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DATED this 19th day of June 1987.

TIMOTHY W. SORENSON

JERRY D. BROWNLOW

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

September 10, 1986

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RE: Case No. C5374

STYLE: BOB SCHWARTZ
v. CITY OF GRAND PRAIRIE *et al.*

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

MARY M. WAKEFIELD, Clerk

By /s/ BLANCA E. MORIN
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

February 11, 1987

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RE: Case No. C5374

STYLE: BOB SCHWARTZ
v. CITY OF GRAND PRAIRIE *et al.*

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ BLANCA E. MORIN
Deputy

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

BOB SCHWARTZ,

Appellant,

v. NO. 05-85-01155-CV

THE CITY OF GRAND PRAIRIE and
THE STATE OF TEXAS,
Appellees .

JUDGMENT

In accordance with this Court's opinion of March 13, 1986, the judgment of the trial court is AFFIRMED. It is ORDERED that appellees, the City of Grand Prairie and the State of Texas recover their costs of this appeal from appellant Bob Schwartz.

March 13, 1986.

/s/ PATRICK C. GUILLOT

PATRICK C. GUILLOT
Justice

C-2

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

NO. 058501155CV

BOB SCHWARTZ, FROM A DISTRICT COURT

Appellant,

v.

THE CITY OF GRAND PRAIRIE and
THE STATE OF TEXAS,

Appellees. OF DALLAS COUNTY, TEXAS

BEFORE JUSTICES STEPHENS, GUILLOT AND STEWART

OPINION BY JUSTICE GUILLOT
MARCH 13, 1986

Appellant, Bob Schwartz, appeals from a summary judgment in favor of the City of Grand Prairie and the State of Texas, appellees. For the reasons below, we affirm the judgment of the trial court.

In the trial court, Schwartz sought a declaratory judgment and injunctive relief, contending that ordinances 3363 and 3424 of the City of Grand Prairie were confiscatory, arbitrary, and a denial of due process rights as applied to Schwartz's two parcels of land. These ordinances limited development along a strip of land known as the State Highway 161 corridor. (These ordinances have since been repealed). Schwartz also sought damage recovery for the taking of his property rights while these ordinances were in force.

Schwartz contends on appeal that the trial court erred in granting summary judgment on his constitutional claims and erred in failing to address the damage issue. We need not address Schwartz's points of error because we hold that Schwartz lacks standing to sue.

Schwartz never requested a building permit or a variance from the Grand Prairie Board of Adjustments for his "19th Street property." Schwartz did apply for a building permit for his "Dalworth property," but the permit was denied by a city plan review analyst. Schwartz did not, however, appeal this denial to the Board of Adjustment, nor did he request a variance for his property.

Schwartz did not obtain a final decision from the City of Grand Prairie regarding the application of these ordinances to his properties. Therefore, we hold that his suit is not ripe, and that he lacks standing to bring suit. *See, Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 105 S.Ct. 3108, 3117 (1985); and *Currey v. Kimple,* 577 S.W.2d 508, 513 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.).

We affirm the judgment of the trial court.

/s/ PATRICK C. GUILLOT

PATRICK C. GUILLOT
Justice

DO NOT PUBLISH
TEX. R. CIV. P. 452.

ORDINANCE NO. 3363

AN ORDINANCE RECOGNIZING THE RIGHT OF WAY OF TEXAS STATE HIGHWAY 161; PROHIBITING DEVELOPMENT WITHIN THE CORRIDOR OF SAID HIGHWAY; TO BECOME EFFECTIVE UPON ITS PASSAGE AND APPROVAL.

WHEREAS, The Texas Department of Highways and Public Transportation has publicly announced the project to construct Texas State Highway 161 through the City of Grand Prairie; and

WHEREAS, public hearings were conducted related to the location of the right of way of said Highway 161 on January 15, 1975, and environmental impact studies have been made and completed; and

WHEREAS, the City has reviewed an official map of the right of way of Texas State Highway 161 dated June 1979, revised April 1980 and June 1981 and entitled "S.H. 161 From I.H. 20 to S.H. 114 — SCHEMATIC", which map is on file in the office of the Director of Public Works of the City; and

WHEREAS, the State of Texas has indicated to the City that it will begin acquiring the right of way shown on said map; and

WHEREAS, the right of way should be protected from encroachments and obstructions; and

WHEREAS, the construction of Texas State Highway 161 will be beneficial to the growth, development, commerce and travel of the citizens of Grand Prairie, Texas.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS:

SECTION 1: THAT there shall be allowed no development, zoning, platting nor the issuance of building permits within the area designated on the Schematic Map referred to above as the right of way of Texas State Highway 161.

SECTION 2: THAT a copy of this ordinance shall be maintained in the Office of the City Secretary, Planning Department, Building Inspection Department, and Public Works Department for public information and review.

SECTION 3: THAT this ordinance shall be in full force and effect upon passage and approval.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS, this 3rd day of August, 1982.

/s/ ANNE GRESHAM

MAYOR,
CITY OF GRAND PRAIRIE, TEXAS

ATTEST:

/s/ SUE SHAWVER

City Secretary

ORDINANCE NO. 3424

AN ORDINANCE AMENDING ORDINANCE NUMBER 3363; TO BECOME EFFECTIVE UPON ITS PASSAGE AND APPROVAL.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS:

SECTION 1: THAT Section 1 of Ordinance No. 3363 shall be amended to read in its entirety as follows:

> *"Section 1:* THAT there shall be allowed no development, zoning, platting nor the issuance of building permits within the area designated on the Schematic Map referred to above as the right of way of Texas State Highway 161 except that building permits may be granted for interior remodeling of existing structures not to exceed 50% of the value of the building, fences, above ground swimming pools, replacement of equipment in existence as of the date of this ordinance and temporary, portable buildings not over 200 square feet."

SECTION 2: THAT this Ordinance shall be in full force and effect upon its passage and approval.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS, this 11th day of January, 1983.

/s/ ANNE GRESHAM

MAYOR,
CITY OF GRAND PRAIRIE, TEXAS

ATTEST:

/s/ SUE SHAWVER

City Secretary

ORDINANCE NO. 3629

AN ORDINANCE AMENDING ORDINANCE NUMBERS 3363 AND 3424 PROHIBITING DEVELOPMENT WITHIN THE CORRIDOR OF TEXAS STATE HIGHWAY 161; TO BECOME EFFECTIVE UPON ITS PASSAGE AND APPROVAL.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS:

SECTION 1: THAT Ordinance Numbers 3363 and 3424 prohibiting development within the corridor of Texas State Highway 161 shall be amended by adding a termination date as follows:

> Ordinance Numbers 3363 and 3424 shall be of no force and effect and the prohibitions thereof shall cease December 31, 1984.

SECTION 2: THAT this Ordinance shall be in full force and effect upon its passage and approval.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS, this the 26th day of June, 1984.

/s/ J V DEBO III

MAYOR,
CITY OF GRAND PRAIRIE, TEXAS

ATTEST:

/s/ SUE SHAWVER

City Secretary

(2)

NO. 86-2067

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

BOB SCHWARTZ,
Petitioner,

V.

CITY OF GRAND PRAIRIE, TEXAS and
STATE OF TEXAS,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Texas

TEXAS'S MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

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Attorney General of
Texas

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
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NO. 86-2067

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On Petition for a Writ of Certiorari
to the Supreme Court of Texas

TEXAS'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Texas accepts Petitioner's statement of the case (Pet. pp. 5-7) with the following qualifications: (a) the assertion of Petitioner's feelings of futility about appealing the denial of his application for a building permit is outside the record of the case; and (b) a fair statement of the case should include the unrefuted contentions made by Texas in the trial court on Motion for Summary Judgment (Tex. App. A):

- That Texas did not participate in the adoption of the ordinances complained of;

- That Texas, *pursuant to statute*, planned for the roadways through Grand Prairie, Texas as part of the Texas Highway System.

Petitioner's case, insofar as the State of Texas is concerned, is for inverse condemnation bottomed upon (a) a claim that the State conspired with the City of Grand Prairie for the enactment of ordinances proscribing the granting of building permits within the corridor of proposed State Highway 161, previously announced by the State; and (b) a claim that the State, after announcing the project in 1970 failed to acquire Petitioner's property by July 27, 1984, to his detriment, under the Fifth and Fourteenth Amendments to the United States Constitution.

The Respondent State is involved in this cause because on April 19, 1972, the State Highway and Public Transportation Commission (State Highway Commission), an agency of the Respondent State, approved a location for a new public highway, subsequently designated State Highway 161 (SH 161), following a 1970 public hearing to determine the location of the highway through the Cities of Irving and Grand Prairie. Petitioner purchased his "Dalworth Street Lot" in 1972. Subsequently the State Department of Highways and Public Transportation (State Highway Department), another agency of the Respondent State, held separate public hearings on the design of two sections of SH 161 that will be routed through the City of Grand Prairie.

At a design hearing, held on June 14, 1973 in Grand Prairie, there was considered a section of

the SH 161 project that would require the acquisition of right-of-way from a portion of Petitioner's property, known as "Dalworth Street Lot". At a second design hearing, held on January 15, 1975, in Grand Prairie, there was considered another section of the SH 161 project that would require the acquisition of right-of-way from a portion of the Petitioner's property, referred to as "the 19th Street land."

The Respondent State has not acquired right-of-way from either of the Petitioner's properties; initially, because funding was not available, and currently, because the United States District Court, Northern District of Texas, has enjoined acquisition of the right-of-way for SH 161 until United State Department of Transportation officials comply with provisions of the National Environmental Policy Act and implementing regulations.

1. The State Highway Department is the operating arm of the State Highway Commission. Sec. (b) of Article 6665; Article 6666 of the Texas Civil Statutes. Sec. 1 of Article 6674w-1 of the Texas Civil Statutes authorizes the State Highway Commission, among other directives, to plan for future controlled access highways, such as the SH 161 project, as part of the State Highway System established by Article 6674b of the Texas Civil Statutes.

2. The Petitioner purchased both properties involved in this cause *after* the route for SH 161 through Grand Prairie was approved by the State Highway Commission. The Petitioner purchased "the 19th Street land" after it had been identified at the 1975 public hearing as one of the properties in the path of the proposed right-of-way for SH 161.

3. The State Highway Department intends to construct SH 161 with Federal-aid highway funds. It continued planning for the project after the public hearings. In 1979 the precise right-of-way requirements for SH 161 were established. Subsequently, lack of funds prevented the Respondent State from acquiring substantial portions of the right-of-way for SH 161, including the right-of-way parcels required from the Petitioner's properties. Although the funding impediment has now been overcome, in April 1983, a group of Grand Prairie residents brought suit in the United State District Court, alleging among other deficiencies in the SH 161 planning process, a failure on the part of United State Department of Transportation officials to satisfy the statutory and regulatory criteria for Federal-aid highway projects prescribed by the National Environmental Policy Act (NEPA). 42 U.S.C. §4331 *et seq*.

4. The Federal litigation was resolved adversely to the Federal officials in 1985. *Association Concerned About Tomorrow, Inc. (ACT) v. Dole*, 610 F.Supp. 1101 (N.D. Tex., 1985). As a result of the Federal Court decision, no right-of-way may be acquired for the part of SH 161 proposed for Grand Prairie and no Federal funding may be made available to Respondent State for the Grand Prairie portion of the project until further environmental processing has been performed that conforms with NEPA requirements.

5. A distinct possibility now exists that neither or only one of the Petitioner's properties involved in this cause may be needed for the SH 161 project following completion of the environmental studies required by the Federal Court. Whatever the final outcome of the environmental processing, the Petitioner's right to receive his constitutionally guaranteed adequate compensation for his properties

that may be acquired for SH 161 has not been diminished by any actions of officials or employees of Respondent State. At all times since the commencement of the SH 161 project, the Petitioner remains as free to dispose of his properties as he was to acquire them.

There being no evidence before the Court on the record that Texas had any hand in the ordinances complained of, Petitioner's only possible claim against Texas is for an inverse condemnation in its planning of a highway project that might ultimately require the condemnation of Petitioner's property. Such a claim is untenable in Texas[1] and in the federal courts under the Fifth Amendment.[2]

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1. See *Hubler v. City of Corpus Christi*, 564 S.W.2d 816, 821 (Tex. Civ. App. - Corpus Christi, 1978; writ of error refused by Texas Supreme Court with notation "No Reversible Error"), and cases cited; *City of Houston v. Bigger*, 380 S.W.2d 700, 704 (Tex. Civ. App. - Houston 1964; writ of error refused by Texas Supreme Court with notation "No Reversible Error"; cert. denied, 380 U.S. 962, 85 S.Ct. 1105, 14 L.Ed.2d 153 (1964).

2. *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 104 S.Ct. 2187 (1984) "Impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking." *Danforth v. U.S.* 308 U.S. 271, 285; *Sanders v. Erreca*, 317 F.2d 960, 964 (9th Cir. 1967); Cert. Den. 389 U.S. 1039; *Stone Mountain Game Ranch v. George*, 746 F.2d 761 (11th Cir. 1984). *First Lutheran Church v. Los Angeles County*, 1987, Slip Opinion at p. 15.

6. Actions by highway officials and employees of the Respondent State relative to Petitioner's properties have been conducted in furtherance of their statutory duty to plan for, design and lay out public highways that will become part of the State Highway System of Texas. No official or employee of the Respondent State has either allegedly or in fact physically interfered with either of the Petitioner's properties nor attempted to assert any possessory rights in either property.

7. The essence of the Petitioner's complaint is his temporary loss of bargain. The Petitioner's business is to speculate on the appreciation of real estate. The inability of the Respondent State to acquire his properties in 1983 or 1984 for SH 151 apparently frustrated the Petitioner. He erroneously suggests that the right to profit promptly by the sale of properties he elects to buy is constitutionally guaranteed. The reality in this case is that the Petitioner, after purchasing property in the path of a future highway right-of-way, became impatient with the right-of-way acquisition process.

8. The Petitioner's contentions totally ignore the State and Federal statutory mandates on highway officials and employees of Respondent State to hold public hearings before going forward with projects such as SH 161. Sec. 1 of Article 6674w-1, *supra*; 23 U.S.C. §128. A prime reason for requiring such hearings is to make the public, including the Petitioner, aware of a proposed highway project.

The State of Texas concurs in the opinion of the Texas Court of Appeals that Respondent's suit

in the Texas District Court was not ripe[3], and that Respondent lacked standing to sue on his alleged claims.

The State of Texas concurs in, and adopts as its own, the Brief of the City of Grand Prairie in the premises.

CONCLUSION

1. The State of Texas, having had no part in the passage or implementation of the ordinance complainted of, having had no control over the availability of funds to acquire right-of-way for and to construct Highway 161, and having been enjoined by the U.S. District Court from proceeding in any fashion with the highway, cannot possibly be said to have violated any Fifth or Fourteenth Amendment rights of Respondent.

2. Respondent's claims were not ripe for adjudication as the result of which he had no standing to sue on them in the Texas Court.

For the foregoing reasons the Petition should be denied.

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3. This Court has endorsed the ripeness requirement of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194 (1985) in *First Lutheran Church v. Los Angeles County*, (1987), Slip Opinion at p. 7, footnote 6.

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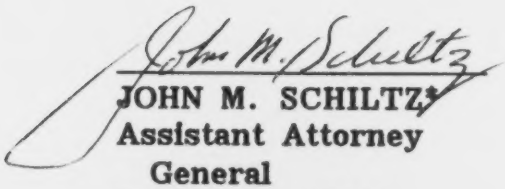

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APPENDIX A-1

NO. 84-3406-B

BOB SCHWARTZ		IN THE 44TH
VS.		JUDICIAL DISTRICT COURT DALLAS
CITY OF GRAND PRAIRIE, TEXAS AND THE STATE OF TEXAS		COUNTY, T E X A S

RESPONSE TO DEFENDANT STATE OF TEXAS TO PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT AND TO MOTION FOR PARTIAL SUMMARY JUDGMENT OF DEFENDANT CITY OF GRAND PRAIRIE

TO THE HONORABLE JUDGE OF THE 44TH JUDICIAL DISTRICT COURT:

Defendant State of Texas DOES NOT oppose a Motion for Partial Summary Judgment heretofore filed in the captioned cause by Defendant City of Grand Prairie, Texas.

Defendant State of Texas DOES oppose the Plaintiff's Second Motion for Summary Judgment heretofore filed in this captioned cause for the following grounds:

1. Defendant State of Texas has not taken or damaged the properties of the Plaintiff, more fully described in Paragraph II of Plaintiff's Second Amended Original Petition, in any manner contemplated by the Constitution or statutes of the United States and the State of Texas to entitle the Plaintiff to maintain this cause of action against the Defendant State of Texas, until the said Defendant has waived its sovereign immunity against the bringing of this cause of action against it.

2. Defendant State of Texas has not denied the Plaintiff any use or prevented his right to sell the property, more fully described in Paragraph II of Plaintiff's Second Amended Original Petition, to entitle Plaintiff to assert any claim whatsoever herein for monetary compensation from the Defendant State of Texas until the said Defendant waives its sovereign immunity against the bringing of this cause of action against it.

3. The Defendant State of Texas did not participate in the adoption by the City of Grand Prairie of certain ordinances, more fully identified in Paragraph IV of Plaintiff's Second Amended Original Petition, and cannot be held liable in this cause for any damages Plaintiff alleges he sustained by reason of any or all of the said ordinances, and;

4. The State Highway and Public Transportation Commission, acting by and for the Defendant State of Texas pursuant to statute, authorized and directed the State Department of Highways and Public Transportation to plan for and lay out roadways throughout the State of Texas, including roadways through the City of Grand Prairie, Texas, as part of the State Highway System; therefore, performance of those duties and responsibilities by the said State Department of Highways and Public Transportation cannot confer upon the Plaintiff the right to maintain this cause of action against the State of Texas by reason of such actions by the said governmental agencies.

WHEREFORE, Defendant State of Texas respectfully requests the Court to grant the Motion for Partial Summary Judgment heretofore filed in this cause by Defendant City of Grand Prairie and to deny, in all things, the Plaintiff's Second Motion

for Summary Judgment and charge all costs herein against the Plaintiff.

Respectfully submitted,

JIM MATTOX
ATTORNEY GENERAL OF TEXAS

DAVID R. RICHARDS
EXECUTIVE ASSISTANT ATTORNEY GENERAL

DUDLEY FOWLER
ASSISTANT ATTORNEY GENERAL
CHIEF, HIGHWAY DIVISION

/s/ David R. Thomas
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State Bar No. 198847000

CERTIFICATE OF SERVICE

This is to certify that the foregoing Response to Defendant State of Texas to Plaintiff's Second Motion for Summary Judgment and Motion for Partial Summary Judgment of Defendant City of Grand Prairie in the 44th Judicial District Court of Dallas County, Texas, has been delivered by United States Postal Service, Certified Mail, Return Receipt Requested, this _____ day of March, 1985, to the following attorneys of record in said cause:

APPENDIX A-4

1. Jerry D. Brownlow
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   Grand Prairie, Texas 75050
   Attorney for Plaintiff Bob Schwartz;

2. Clayton Hutchins
   City Attorney
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   Grand Prairie, Texas 75051

3. William R. Allensworth
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   Dallas, Texas 75270
   Attorney for Defendant City of Grand Prairie, Texas

DAVID R. THOMAS
Assistant Attorney General

No. 86-2067

In the
Supreme Court of the United States
October Term, 1987

BOB SCHWARTZ,

Petitioner,

vs.

CITY OF GRAND PRAIRIE, TEXAS,
and
STATE OF TEXAS,

Respondents.

On Writ of Certiorari to the Supreme Court of Texas

CITY OF GRAND PRAIRIE, TEXAS' BRIEF IN OPPOSITION TO CERTIORARI

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Attorneys for Respondent City of Grand Prairie, Texas

July 17, 1987

QUESTIONS RESTATED

1. Whether Petitioner Schwartz[1] failed to obtain City of Grand Prairie's final determination regarding the application of its ordinances to Schwartz' 19th Street Property by his failure to seek a building permit, or take any other action to develop his 19th Street property. *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

2. Whether Petitioner Schwartz failed to obtain City of Grand Prairie's final determination regarding the application of its ordinances to Schwartz' Dalworth Street lot by his failure to appeal the first denial of his requested building permit for his Dalworth Street lot. *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

3. Whether this Court has JURISDICTION to decide for the first time whether Petitioner's claims of taking have merit when the Texas state courts did not pass on these claims because they found that Petitioner failed to obtain City of Grand Prairie's final determination regarding the application of its ordinances to Schwartz' property. *Illinois v. Gates,* 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

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[1] Only the parties denoted in the caption are interested in the outcome of this proceding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTION

Respondent City of Grand Prairie does not dispute this Court's jurisdiction over *one issue* which was defensively raised by Petitioner: whether Petitioner Schwartz failed to obtain City of Grand Prairie's final determination regarding the application of its ordinances to Petitioner's property by his failure to seek a building permit or take any other action to develop his 19th Street property and his failure to appeal the first denial of his requested building permit for his Dalworth Street lot. *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

Respondent contends that this Court does not have jurisdiction to determine whether Petitioner's claims of taking have merit when the Texas state courts did not pass on these claims because they found that Petitioner failed to obtain City of Grand Prairie's final determination regarding the application of its ordinances to Schwartz' property. *Illinois v. Gates,* 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

STATUTES & ORDINANCES INVOLVED

In addition to the constitutional and statutory authority cited by Petitioner, the following statute and ordinances are involved in this appeal:

1. TEX. REV. CIV. STAT. ANN. art. 1011g(g)(1) (Vernon 1963) which empowers the Board of Adjustment as follows: "To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this Act or of any ordinance adopted pursuant thereto."

2. GRAND PRAIRIE, TEX., CODE art. VI, § 2-103, which states:

> In addition to the authority and power of Article 1011g, Vernon's Annotated Civil Statutes and Ordinance No. 2299, as amended, the zoning board of adjustment and appeals may act as a recommending body to the city council and planning and zoning commission related to matters within their jurisdiction. (Code 1964, Amended, § 2.51(b); Ord. No. 3359, § 3, 7-6-82)

3. GRAND PRAIRIE, TEX., CODE art. VI, § 2-104, which states in relevant part:

> Appeals to the board of adjustment and appeals can be taken by any person aggrieved or by any officer, department, board or division of the municipality, as provided in section 2-103, affected by any decision of the administrative officer. Such appeal shall be taken within fifteen (15) days time after the decision has been rendered by the administrative officer, by filing with the officer from whom the appeal is taken and with

the board of adjustment and appeals, a notice of appeal specifying the grounds therefor, tendering with such notice the amount in accordance with the following fee schedule to cover the cost of processing such appeal:

Initial application	$ 35.00
First review	50.00
Second review	75.00
Third review	100.00
Fourth review	150.00
Fifth review and each review thereafter	200.00

The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. (Code 1964, Amended, § 2.51(c)(1))

No. 86-2067

In the

Supreme Court of the United States

October Term, 1987

BOB SCHWARTZ,

Petitioner,

vs.

CITY OF GRAND PRAIRIE, TEXAS,
and
STATE OF TEXAS,

Respondents.

On Writ of Certiorari to the Supreme Court of Texas

CITY OF GRAND PRAIRIE, TEXAS' BRIEF IN OPPOSITION TO CERTIORARI

STATEMENT OF THE CASE

This suit concerns two parcels of land owned by Petitioner Schwartz in Grand Prairie, Texas. They consist of

a vacant lot[1] which Mr. Schwartz, acquired in 1972 for $7,000 (the "Dalworth lot"), and an 8 acre tract on the north side of town (the "19th Street property") which Mr. Schwartz purchased in 1978.[2] Both parcels of land lie in the path of proposed State Highway 161, the route of which was approved by the State in April, 1971.

On August 3, 1982, Grand Prairie passed a building ordinance restricting development within the S.H. 161 corridor. In December, 1983, Petitioner applied for a building permit *only on his Dalworth lot.* This permit application was denied in January, 1984 by a plan review analyst for the City of Grand Prairie.[3] Mr. Schwartz did not seek a review of this low level decision by any administrative procedure he had at his disposal. This suit ensued, during the pendency of which the ordinance was repealed.

Grand Prairie has, since January 1, 1985, granted building permits in the S.H. 161 corridor. Petitioner Schwartz, however, has neither renewed his request for a building permit on the Dalworth lot nor made any application for a permit on the 19th Street property. Indeed, Plaintiff *never has applied for a permit on the 19th Street*

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[1]Mr. Schwartz bought the Dalworth lot with a house in 1972. His only act of development before he applied for a building permit in 1983 occurred when the City of Grand Prairie condemned and tore down the house on the Dalworth lot. Appendix A, Excerpt of Deposition of Mr. Schwartz on June 19, 1984 at 12, lines 3-6 (attached to City of Grand Prairie's Motion for Summary Judgment in the trial court, and part of the record on appeal).

[2] The City of Grand Prairie believes that Mr. Schwartz has now sold this 19th Street Property for as great as a 1200% increase over his original purchase price.

[3] Petition for Certiorari at C-3.

property, either before, during or after the effective date of the ordinance.[4]

REASONS FOR DENYING THE WRIT

COUNTERPOINT NO. I

THE TEXAS COURT OF APPEALS CORRECTLY UPHELD THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT ON THE GROUNDS THAT SCHWARTZ' ATTACK ON THE GRAND PRAIRIE ORDINANCES WAS PREMATURE BECAUSE HE FAILED TO OBTAIN A FINAL DETERMINATION REGARDING THE APPLICATION OF GRAND PRAIRIE'S ORDINANCES TO HIS PROPERTY RIGHTS. *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 105 S. CT. 3108, 87 L. ED. 2D 126 (1985).

Petitioner Schwartz neither made application for a building permit nor took any other action to seek to build on his 19th Street property. His only effort to develop his Dalworth lot was to make one application for a building permit. This application was denied by a plan review analyst with the City on January 30, 1984. Schwartz did not appeal this denial to the Board of Adjustment and did not seek a variance, but instead filed this lawsuit on March 14, 1984. He claims that he was justified in not obtaining City of Grand Prairie's final determination because he "felt" that such an appeal would be "futile,"[5]

[4] Appendix B, Affidavit of Mr. Ditta at 1-2 (attached to City of Grand Prairie's Reply Brief in the trial court, and part of the record on appeal).

[5] Petition for Certiorari at 6.

and that this Court should accept his feelings as binding upon City of Grand Prairie.

Schwartz could have appealed to the Board of Adjustment for the City of Grand Prairie, pursuant to Grand Prairie, Texas, Code article VI, § 2-104. The Board has jurisdiction as provided in Texas Revised Civil Statutes Annotated article 1011g(g)(1) and Grand Prairie, Texas, Code article VI, § 2-103. Section 2-103 authorizes the Board to act as a recommending body to the city council and the planning and zoning commission. Schwartz, therefore, had at least two grounds for appeal to the Board: (1) that the City's plan review analyst erred in his decision to deny Schwartz' application for a building permit, and (2) that the Board should recommend to the planning and zoning commission and to the city council that Schwartz should be granted a building permit, or that the City's building moratorium ordinance should be repealed, or that he should be granted a variance.[6] Schwartz, however, did not seek relief from the City, and instead brought this action in the Texas courts.

The United States Supreme Court recently held that a landowner whose property allegedly had been "taken" by the application of government regulations could not state a claim for compensation until or unless he had obtained a final determination of the applicability of the ordinance to

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[6] GRAND PRAIRIE, TEX., CODE art. VI, § 2-103. Petitioner argues that the Board could not grant a variance, which obviates him from his obligation to appeal and obtain a final determination of the city's ordinance's application to his Dalworth lot. This argument begs the question: if Petitioner sincerely wanted a building permit he could have appealed to the Board seeking the Board's recommendation to the City Counsel to grant him a permit, a variance or repeal the ordinance.

his property in *Williamson County Regional Planning Comm'n v. Hamilton Bank.*[7] In *Williamson,* a developer argued that the county planning commission had taken his property without compensation by applying zoning ordinances and subdivision regulations retroactively to deny his request for approval of a subdivision plat.

Although the developer made numerous submittals to the zoning authorities, appealed to the higher zoning authority and had re-submitted his plat, the court held that because he had not requested variances he "had not obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property . . . ."[8] It reasoned that because the Court

> . . . consistently has indicated that among the factors of particular significance in this inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations[,] [t]hose factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.[9]

In support of its decision, the Court relied on *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,*[10] a case in which it had rejected a claim that a taking had occurred, because the record did not indicate that the aggrieved parties had availed themselves of opportunities provided by law for administrative relief such as request-

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[7] 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

[8] 105 S. Ct. at 3117.

[9] *Id.* at 3119 (citations omitted).

[10] 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981).

ing a variance or a waiver of the applicability of certain statutory requirements to their interests. Similarly, in *Agins v. City of Tiburon,*[11] the Court held that a challenge to a zoning ordinance was not ripe because the property owners had not yet submitted a plan for development of their property.[12] Finally, the Court relied upon *Penn Central Transp. Co. v. City of New York,*[13] where it had declined to find that a city law affected a taking of Grand Central Terminal because the property owners had not sought approval for any plan other than one which the City's Landmarks Preservation Commission had disapproved (involving a 50-story office building above the terminal).

The Supreme Court's two recent opinions which have reached the issue of temporary takings have not altered the final determination requirement set forth in *Williamson.* In *First English Evangelical Lutheran Church v. County of Los Angeles,*[14] the Court found that a California procedural device similar to a demur or Federal Rule of Civil Procedure 12(b)(6) motion presented the Court with the ripe question of temporary takings. In *Lutheran Church,* the Court specifically noted the lower courts' disposition of the question of temporary takings on the merits which permitted the Supreme Court to reach the issue.[15]

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[11] 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d. 106 (1980).

[12] 447 U.S. at 260, 100 S. Ct. at 2141.

[13] 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

[14] ___ U.S. ___, 107 S. Ct. 2378, ___ L. Ed. 2d ___ (1987).

[15] 107 S. Ct. at 2383-84.

The Supreme Court also reached the temporary takings question in *Nollan v. California Coastal Comm'n,*[16] Although the Court did not expressly discuss the ripeness of the issue presented in *Nollan,* the Nollans sought and obtained a final determination of a taking. The Nollans sought a building permit from the Commission, and were granted one with restrictive limitations. The Nollans then sought state district court review of the Commission's decision by writ of administrative mandamus. The state court remanded the Nollans' matter to the Commission for further hearing, which resulted in the Commission's second determination that the Nollans' building permit would be subject to certain restrictions. From this final determination the Nollans again sought a writ of administrative mandamus in state court, which again held in favor of the Nollans. From this court decision the Commission appealed successfully. The Nollans then sought a writ of certiorari from the United States Supreme Court, which the Court granted. The Nollans thus had obtained the Commission's final determination twice, and all the courts discussed the takings claim which they brought.[17]

Both *Lutheran Church* and *Nollan* leave unaltered the requirement that a claimant seeking by inverse condemnation damages for a taking of property without just compensation obtain first a final determination from the offending governmental entity. Schwartz, however, like the developer in *Williamson,*[18] has failed to obtain a final determination of the application of the City's ordinances

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[16] ___ U.S. ___, 107 S. Ct. 3141, ___ L. Ed. 2d ___ (1987) (WESTLAW, SCT Database).

[17] *See* WESTLAW slip op. at 2-3.

[18] 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

to his property interests. He has made no effort to obtain administrative relief by appealing to the City's Board of Adjustment to seek reconsideration of the application of the ordinance to Schwartz' Dalworth Street lot (compare *Hodel*[19]). He never submitted an application for a building permit on his 19th Street property (compare *Agins*[20]). He submitted only one application for a building permit on his Dalworth lot, but never submitted alternative proposals (compare *Penn Central*[21]). Finally, Schwartz never appealed the denial of his request for a building permit (compare *MacDonald, Sommer & Frates v. Yolo County*[22]). Consequently, he is asking the Court to speculate as to what the City's response would have been to an application for a building permit on the 19th Street property — if he had requested one — or to the outcome of an appeal of the denial of a permit on his Dalworth lot — if he had taken one — and to award damages based upon the City's presumed response to either of these actions. This Court should decline this invitation as it did in *Williamson* and rule that Mr. Schwartz' constitutional claims are premature.

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[19] 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981).

[20] 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980).

[21] 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

[22] ___ U.S. ___, 106 S. Ct. 2561, 2568, 91 L. Ed. 2d 285 (1986) (holding that a first-negative-response to a proposed plan of development is *not* a final determination).

COUNTERPOINT II.

THIS COURT LACKS JURISDICTION TO DETERMINE PETITIONER'S CLAIMS OF TAKINGS BECAUSE THEY WERE *"NOT PRESSED NOR PASSED UPON"* BY TEXAS STATE COURTS.

Although most of Petitioner's brief is devoted to rebutting Respondent's arguments that Petitioner did not obtain a final determination as required by this Court's holding in *Williamson,* Petitioner presents questions and arguments that urge this Court to reach the merits of his takings claims. Doing so would be improper for this Court under its *"not pressed nor passed upon"* rule.[23] This Court should refrain from exercising its resources to review and determine the merit of Petitioner's claims and should permit Texas state courts to first determine whether Mr. Schwartz' bundle of property rights has been encroached upon by City of Grand Prairie.

Although subject to this Court's discretion, this Court established and held to its jurisdictional rule or prudential restriction that it should not decide questions *"not pressed nor passed upon"*[24] by the state courts from which an appeal is taken. In *Illinois v. Gates,*[25] this Court limited its review of a case to those issues raised before and

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[23] *See* U.S. Sup. Ct. R. 16.1(b), 28 U.S.C.A. § 2071, et seq. (1984) (stating that a ground for jurisdictional challenge is that a federal question "sought to be reviewed was . . . not expressly passed on . . . .").

[24] *Illinois v. Gates,* 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

[25] *Id.*

determined by the Illinois Supreme Court, rather than to an additional issue addressed by the parties in their briefs.[26] The Court reviewed the cases which treated this doctrine as jurisdictional, such as *Crowell v. Randell,*[27] in which Justice Storey stated that "[i]f both of these requirements do not appear on the record, the appellate jurisdiction fails." In *McGoldrick v. Compagnie Generale Transatlantique,*[28] the Court stated that

> In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review.[29]

These reasons necessitate restraint by this Court in this case.

Schwartz presented his takings claims to the state courts of Texas which cited this Court's opinion in *Williamson County Regional Planning Comm'n v. Hamilton Bank,*[30] and held that Schwartz' claims were premature. If this Court should now limit or restrict its opinion in *Williamson* in some manner, the state courts of Texas should be permitted to review Schwartz' claims in light of this Court's recent opinions in *First English Evangelical*

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[26] 462 U.S. at 217, 103 S. Ct. at 2321.

[27] 10 Pet. 368, 392, 9 L. Ed. 458 (1836).

[28] 309 U.S. 430, 434-35, 60 S. Ct. 670, 672-73, 84 L. Ed. 849 (1940).

[29] *Id.*

[30] 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

Lutheran Church v. County of Los Angeles,[31] and *Nollan v. California Coastal Comm'n.*[32] This is due to the proper deference accorded to a state court's prerogative to review the constitutional attack on its jurisdiction's law or ordinance, perhaps with an outcome based on state law and not offensive to the constitution. Further, this Court has acknowledged the general reluctance to reach and determine that legislation is violative of the constitution.[33] As in *Illinois v. Gates,* [34] this Court should decline to accept Petitioner's invitation to expand its review of Petitioner's claimed injuries beyond the scope of the opinion of the Court of Appeals.

In summary, this case involves a landowner who was overeager to sue the City of Grand Prairie for damages rather than to propose development plans, seek building permits, appeal the denial of them (assuming this would occur on the 19th Street property) and seek to have the ordinance revoked through the City's administrative process. In fact, shortly after Petitioner filed his lawsuit, Ordinance No. 3629 was passed which set December 31, 1984 as the expiration date for the building moratorium.[35] Petitioner assumed too much when he "felt it futile to appeal"[36] and thought the City of Grand Prairie necessarily shared his feelings. This Court should accord the City

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[31] ___ U.S. ___, 107 S. Ct. 2378, ___ L. Ed. 2d ___ (1987).

[32] ___ U.S. ___, 107 S. Ct. 3141, ___ L. Ed. 2d ___ (1987) (WESTLAW, SCT Database).

[33] *Gates,* 462 U.S. at 217-18, 103 S. Ct. at 2322.

[34] *Id.*

[35] Petition for Certiorari at F-1.

[36] *Id.* at 6.

of Grand Prairie the dignity and protection to make its final determinations for itself.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent City of Grand Prairie, Texas

Q What else is in that file?

A The deed, you know.

Q Because you bought this unimproved, didn't you?

A Yes, sir — no, there was some improvements on it at the time we bought it, but there was some old houses and we red tagged them and demolished them.

Q When you say old houses, was the lot big enough to have — was there more than one rent house on there?

A There was three lots involved in it at the time. You know, on this particular lot we're speaking of it was — an associate of mine and I bought three lots, one-half undivided interest in all three lots. Then we divided up one lot each where we would have one free and clear after they were paid for. We had them on a ten year note. We paid them off, and I took Lot 14 and he took Lot 16 and we own jointly Lot 15.

Q Undivided?

A Undivided interest.

Q And the lot that is made the basis of this suit is —

A Lot 14.

Q — Lot 14, and that's the one you own free and clear?

A That's right.

Q What did you pay for that lot?

A Including interest or —

Q The cash sales price and then we'll figure it not including interest.

B-1

NO. 84-3406-B

BOB SCHWARTZ, *Plaintiff,* VS. CITY OF GRAND PRAIRIE, TEXAS, AND THE STATE OF TEXAS, *Defendants.*	IN THE DISTRICT COURT DALLAS COUNTY, TEXAS 44TH JUDICIAL DISTRICT

EXHIBIT "E"

AFFIDAVIT OF VINCE DITTA

STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, the undersigned authority, personally appeared VINCE DITTA, who, after being by me duly sworn, stated:

1. I am Vince Ditta, Chief Building Official of the Building Inspecting Department of the City of Grand Prairie, Texas. I am over twenty-one (21) years old, of sound mind and am competent to make this Affidavit. I have personal knowledge of each of the facts contained in this Affidavit.

2. The City of Grand Prairie, Texas never received an application for a building permit on Lots 1 through 6, Block 1, County Wood Addition, an addition to the City of Grand Prairie, Dallas County, Texas ("19th Street land") from Mr. Bob Schwartz, or anyone else, during the building moratorium on the S.H. 161 corridor (August 3, 1982 through December 31, 1984). The City of Grand

Prairie never denied Mr. Bob Schwartz a building permit on the 19th Street land.

3. Since January 1, 1985 the City of Grand Prairie's policy has been to grant otherwise proper building permit requests without regard to the subject property's location in the S.H. 161 corridor. The City has, in fact, granted several building permits on land in the S.H. 161 corridor.

4. I know of no reason why upon properly applying for a building permit in compliance with applicable laws, ordinances and regulations, Mr. Bob Schwartz would not be granted one. It certainly would not be denied merely because it was in the S.H. 161 corridor. Mr. Bob Schwartz has not applied for a building permit even after January 1, 1985 on either his 19th Street land or his Dalworth Street lot (Lot 14, Block 143, Dalworth Park Addition, otherwise identified as 1234 Dalworth Street, Grand Prairie, Texas).

FURTHER AFFIANT SAITH NOT.

/s/ VINCE DITTA
VINCE DITTA

SUBSCRIBED AND SWORN TO BEFORE ME this 28th day of February, 1985.

/s/ TERRY L. CROWDER
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My commission expires:
6-7-88